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CITATIONS

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1965

No.

PASQUALE J. ACCARDI, ET AL., PETITIONERS

v.

THE PENNSYLVANIA RAILROAD COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of Pasquale J. Accardi, Jacob Grubesick, Alfred J. Seevers, Anthony J. Varsallo, Abraham S. Hoffman, and Frank D. Pryor,[1] prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on January 25, 1965.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York is reported at 229 F. Supp. 193. The opinion of the court of appeals (App., *infra*, p. 17) is reported at 341 F. 2d 72.

[1] The Department of Justice represents these veterans pursuant to Section 8(e) of the Selective Training and Service Act of 1940, 54 Stat. 885, 891, 50 U.S.C. App. (1946 ed.) 308(e).

JURISDICTION

The judgment of the court of appeals (App., *infra*, p. 22) was entered on January 25, 1965. By order of Mr. Justice Harlan the time for filing a petition for a writ of certiorari was extended to and including June 21, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Employees whose jobs with the respondent railroad were abolished in 1960 were paid separation allowances based upon the number of months in which they had worked at least one day for the respondent. The question presented is whether, by virtue of Section 8 of the Selective Training & Service Act of 1940 (now Section 9 of the Universal Military Training & Service Act of 1951, 50 U.S.C. App. 459), the separation allowances paid to employees whose employment was interrupted by military service should be computed as if they had been continuously employed by respondent during their absence in the Armed Forces.

STATUTE INVOLVED

1. The pertinent provisions of Section 8 of the Selective Training and Service Act of 1940, 54 Stat. 885, 890, as amended, 50 U.S.C. App. (1946 ed.) 308, are as follows:

> (a) Any person inducted into the land or naval forces under this Act for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service * * * shall be entitled to a certificate to that effect upon the

completion of such period of training and service * * *. * * *

(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

* * * * *

(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

* * * * *

(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

2. The provisions of Section 9(c)(1) of the Selective Service Act of 1948, 62 Stat. 615 (renamed the "Universal Military Training and Service Act" by the Act of June 19, 1951, 65 Stat. 75), 50 U.S.C. App. 459, are identical with those of Section 8(c) of the Selective Training and Service Act, but Section 9(c)(2) of the 1948 Act further provides:

> It is hereby declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment.

STATEMENT

1. *Background.* This case involves the application of the re-employment provisions of the Selective Training and Service Act of 1940 (now the Universal Military Training and Service Act, 50 U.S.C. App. 459) to veterans, who, after resuming their civilian employment, were discharged when technological advances caused the elimination of their jobs. The facts are not in dispute.

Petitioners entered the employ of the respondent railroad in 1941 and 1942, when they signed on as "oilers" or "firemen" on the steam-operated tugboats then maintained by the railroad in New York Harbor. Each petitioner's civilian employment with the railroad was interrupted by military service during

the Second World War. After approximately three years of wartime service, petitioners were honorably discharged from the Armed Forces and were restored to their former positions with the railroad.

Following petitioners' re-employment, the railroad replaced almost all of its steam tugboats with diesel vessels. While the former required the services of two men in the engine room (an engineer and a fireman), in the railroad's view the diesel vessels needed only an engineer. In 1959, the railroad's decision to abolish the position of "fireman-oiler" on their diesel tugs led to a serious strike,[2] which was settled by a collective bargaining agreement dated December 2, 1960, between various railroad companies (including respondent) and the unions representing unlicensed engine-room personnel (including petitioners).

No prior collective bargaining agreement covering these employees contained provisions dealing with the abolition of an entire class of employee. The agreement in question makes no reference to, and contains no provisions expressly dealing with, the rights of veterans entitled to the benefit of the re-employment provisions of the Act.

2. *The controversy.* As of December 31, 1960, each petitioner lacked, by a matter of months, twenty years' seniority with the railroad. Under the terms of the December 2 agreement, such employees were dismissed with a monetary separation allowance based upon the

[2] The background of this dispute is detailed in *Baltimore & Ohio R. Co., etc.* v. *United Railroad Wkrs.*, 176 F. Supp. 53 (S.D.N.Y.), affirmed in part and reversed in part, 271 F. 2d 87 (C.A. 2), vacated and remanded, 364 U.S. 278.

number of months in which the employee had worked at least one day for the railroad. In computing those allowances, however, the railroad did not credit the months petitioners spent in military service—on the ground that during that period petitioners did not "work one or more days" each month for the railroad. It is stipulated that, as a result, each petitioner was paid $1,242.60 less than the amount to which he would have been entitled "had [he] continued to render compensated service to the [respondent] throughout their respective periods of military service * * *."

Petitioners contended that the Selective Training and Service Act of 1940 gave them the right to be treated as having been continuously employed during their time in military service for purposes of computing their separation allowances. When the railroad declined to adjust their allowances accordingly, they instituted this action in the district court.

3. *The proceedings below.* Both sides moved for summary judgment. On April 28, 1964, the district court rendered a decision in favor of the petitioners, 229 F. Supp. 193. The court ruled, in substance, that (1) Section 8(b)(B) of the Act required veterans to be restored to positions in their former civilian employment of "seniority, status, and pay" comparable to those which they would have achieved had they been continuously employed; (2) a "separation allowance" falls within the concept of "seniority, status, and pay"; and (3) had petitioners been continuously employed in their civilian jobs they would have been entitled to separation allowances in the amounts they claimed.

"With some doubts," the court of appeals reversed. It recognized that "[i]f the separation allowances granted to plaintiffs in 1960 come within the statutory concepts of 'seniority, status, and pay,' plaintiffs are entitled to be treated as if they had kept their positions continuously during World War II." But the court concluded that these allowances fall rather within the class of "insurance or other benefits," covered by Section 8(c) of the 1940 Act. That section, now Section 9(c)(1) of the Universal Military Training and Service Act of 1951, provides that a veteran restored to his former position:

> * * * shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces * * *.

Since time spent on furlough or leave of absence was not counted in determining an employee's separation allowance, the Second Circuit reasoned that military-service time was also excludable.

REASONS FOR GRANTING THE WRIT

Under the relevant collective bargaining agreement, petitioners are entitled to increased separation allowances if, as they contend, the federal statute requires that veterans be treated for that purpose as if they were continuously employed during the period of their military service. Petitioners are admittedly entitled to nothing more if they are to be treated as having been on "leave of absence" or "furlough." The issue

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is one of substantial importance in the operation of the protective provisions of the Universal Military Training and Service Act of 1951. The ruling below, we believe, is inconsistent with this Court's decisions, and there is a direct conflict among the circuits.

The court of appeals recognized that, under this Court's decisions, returning veterans are entitled to have their time in the service treated as continuous employment—rather than as time on leave of absence or furlough—for purposes of determining seniority and the benefits of "status" and "pay" which flow from seniority. Here, there is no question that petitioners' co-employees have received full credit, for purposes of separation allowances, for any month in which they worked at their civilian jobs for as little as one day. Nonetheless, the court below has concluded that petitioners may not receive comparable benefits based upon the period that their employment by the railroad was precluded by military service. It has reached this result by drawing a distinction between basic benefits (as to which the veteran is to be treated as if he were continuously employed) and "fringe" benefits (as to which he is to be treated as if he were on leave of absence).

We submit that no such distinction was contemplated by the federal statutes—that a veteran's time in military service must be considered for seniority purposes regardless of the nature of the benefit flowing from seniority. The ruling below is of substantial importance not only because technological advances have occasioned a serious and immediate problem as to the proper determination of separation

allowances but also because it will deprive veterans of other "fringe" benefits keyed to seniority.

1. The Second Circuit correctly acknowledged that "if the separation allowances granted to [petitioners] in 1960 come within the statutory concepts of 'seniority, status, and pay,' [petitioners] are entitled to be treated as if they had kept their positions continously during World War II." 341 F. 2d at 74. Only two terms ago, this Court held in *Tilton* v. *Missouri Pacific R. Co.,* 376 U.S. 169, and *Brooks* v. *Missouri Pacific R. Co.,* 376 U.S. 182, that for purposes of determining seniority status and the benefits which flow from it, veterans are to be treated as if they were continuously employed during the period of their absence. In so holding, the Court reaffirmed its prior decision in *Diehl* v. *Lehigh Valley R. Co.,* 348 U.S. 960, where it had reversed a Third Circuit decision holding that the veterans' seniority rights were limited to those which would be enjoyed by a non-veteran who had been on furlough or leave of absence during the time the veteran was in military service. "The principle underlying this legislation is that he who is 'called to the colors [is] not to be penalized on his return by reason of his absence from his civilian job.'" *Tilton* v. *Missouri Pacific R. Co.,* 376 U.S. at 170-171, quoting from *Fishgold* v. *Sullivan Drydock & Repair Corporation,* 328 U.S. 275, 284.

Thus, as the court below noted, if petitioners' position on the seniority roster, or right to an advanced position or rate of pay, depended upon the number of months in which they had worked one day, they would be entitled to be treated as if each had been continu-

ously employed during his period of military service. Where such benefits are dependent solely upon the time an employee is present on the job (and not upon the increased proficiency which comes from experience and training on the job), the veteran is to be accorded the benefits enjoyed by one continuously employed. This is the holding of *Tilton, Brooks,* and *Diehl, supra,* as to position on the seniority roster; of *McKinney* v. *Missouri-Kansas-Texas R. Co.,* 357 U.S. 265, as to the right to advanced position; and of *Moe* v. *Eastern Air Lines,* 246 F. 2d 215 (C.A. 5), and *Borges* v. *Art Steel Co.,* 246 F. 2d 735 (C.A. 2), as to rate of pay.

We know of no basis for distinguishing among the various advantages that may flow from seniority alone, whether they relate to pay, position, vacation rights, job security or separation allowances. To be sure, if the veteran's right to any of these advantages is dependent upon something more than seniority—*i.e.*, if the claimed benefits are the consideration for work a veteran has not performed, or for experience he has not acquired—the veteran cannot claim them. But where the veteran's right to any of these benefits depends solely upon length of service, the veteran is entitled to be treated as if he had been continuously employed during the military service.[3] In particular,

[3] This distinction is at the heart of several decisions of the Second Circuit denying veterans particular vacation benefits, although that Circuit has at times talked as if vacation rights were wholly outside the statutorily protected benefits of "seniority, status, and pay." *Siaskiewicz* v. *General Electric Co.,* 166 F. 2d 463 (C.A. 2); *Dwyer* v. *Crosby Co.,* 167 F. 2d 567 (C.A. 2); *Alvado* v. *General Motors Corporation,* 229 F. 2d 408 (C.A.

no meaningful distinction can be drawn between the right to be paid separation allowances in the present case and the right to wage-rate increases, similarly based upon seniority, which were involved in *Moe* and *Borges*. Both were strictly conditioned on length of service; neither constituted payment for work actually done or for experience gained.

2. The court below apparently believed that a different conclusion was dictated by the language of Section 8(c) of the 1940 Act (now Section 9(c)(1) of the 1951 Act, 50 U.S.C. App. 459(c)(1)), which provides:

> (c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of senority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

The court viewed the statutory scheme as creating a dichotomy between "insurance or other benefits" (as

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2), certiorari denied, 351 U.S. 983. Where length of vacations is strictly dependent on years of service, *i.e.*, seniority, the Act plainly permits a re-employed veteran to include his service time in determining vacation rights. *Mentzel* v. *Diamond*, 167 F. 2d 299 (C.A. 3).

to which the returned veteran was to be treated only as if he had been "on furlough or leave of absence") and the concept of "seniority, status, and pay" (as to which the veteran was entitled to enjoy all the benefits of one who had been continuously employed). The Second Circuit concluded "[w]ith some doubts * * * that the separation allowances in the present case are properly 'other benefits' rather than includible within 'seniority, status, and pay,'" because they were neither "pay for work actually done," nor "a regular part of plaintiff's earnings," nor "a traditional perquisite of seniority." App., *infra*, p. 21. The Sixth Circuit has reached a directly contrary conclusion, treating severance allowances as "pay" for purposes of 50 U.S.C. App. 459, the present re-enactment of the statute here in issue. *Hire* v. *E. I. DuPont de Nemours & Co.*, 324 F. 2d 546, 550.

In our view, the legislative history shows that Congress never intended any such division between ordinary and extraordinary, or between basic and incidental, benefits of seniority. The "insurance or other benefits" language of Section 8(c) serves a discrete function. It was added to make certain that veterans would enjoy, *during their absence in military service,* all those benefits accorded to other employees on leave of absence. It was not intended to limit a veteran's rights upon his return to civilian employment.

The original form of Section 8(c) provided only for the veteran's rights on his return from military service. It stated (86 Cong. Rec. 10790):

> Any person who is restored to a position in accordance with paragraphs (A) or (B) of subsection (b) shall be so restored without loss of seniority, insurance participation or benefits, or other benefits, and such person shall not be discharged without cause within one year after such restoration.

This language was amended, without substantial debate, for the apparent purpose of adding a guarantee that any benefits accruing to employees absent on other forms of leave should also be enjoyed by the veteran while he was absent in military service. In the words of the amendment, the veteran was to "be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into [the military] forces."

Senator Sheppard, Chairman of the Senate Committee which reported the bill, explained (86 Cong. Rec. 10914):

> That amendment would make certain that all trainees would receive the same insurance and other benefits as those who are on furlough or leave of absence in private life. It seems to me to be a good suggestion.

Congressman May, Chairman of the House Committee on Military Affairs, introduced the same amendment in the House, where he explained (86 Cong. Rec. 11702):

> Mr. MILLER. In reference to insurance, will that apply to group insurance? Many in-

> dustrial plants, of course, carry group insurance. Under those contracts they continue their participation while a man is on vacation or furlough. Would they continue those policies in force?
>
> Mr. MAY. This would continue them in force and that is the very purpose of the legislation.

In short, the veteran was to be treated as "on furlough or leave of absence" only for the purpose of assuring him the enjoyment of certain benefits accruing *during his absence—i.e.,* the benefits offered by the employer to other employees on furlough or leave of absence pursuant to provisions in effect at the time the veteran was inducted. It is hardly necessary to add that this Court has long since made it clear that Section 8(c)'s direction that a veteran "be considered as having been on furlough or leave of absence" does not limit the veteran's seniority rights, on his return from service, to those which would be enjoyed by a furloughed employee. *Diehl* v. *Lehigh Valley R. Co.,* 348 U.S. 960, reversing 211 F. 2d 95 (C.A. 3); *Tilton* v. *Missouri Pacific R. Co., supra; Brooks* v. *Missouri Pacific R. Co., supra.*[4]

3. Technological displacement of employees has become a major problem of the economy. The decision below will adversely affect a substantial number of veterans in industries where the steady advances of automation are lowering manpower requirements.

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[4] We recognize that, with regard to separation allowances, the Ninth Circuit reached a contrary conclusion seventeen years ago in *Seattle Star* v. *Randolph,* 168 F. 2d 274. But that decision preceded, and its rationale in no way reflects, the controlling decisions of this Court which have been handed down in the intervening years.

The present case bears significantly upon the scope of the separation rights granted by federal statutes to the extremely large number of employees who have served in the military service since 1940, as well as to the many men still being called into the military service.

Indeed, this decision already has affected the administration of the award made in the recent arbitration of the nationwide dispute relating to the size of railroad crews. Under the terms of that award, many "firemen's" positions are abolished and a significant number of persons will be discharged. The railroads initially acquiesced in the view that the statute (as applied to the award) required the military service of veterans to be treated as "continuous employment" for purposes of computing their separation allowances. Since the decision below was handed down, at least five major railroads have refused to continue making settlements on this basis.

Moreover, the decision below has implications which go beyond the matter of separation allowances. As already observed, the court of appeals has created an exception to the statutory protections recognized in this Court's decisions. Its holding is that a veteran need only be treated as "continuously employed" for the purposes of determining the "basic" rights of "seniority," "status," and "pay"; he need not be so treated for the purpose of determining his right to "fringe" benefits under collective bargaining agreements. Thus, the decision will also inevitably affect veterans' claims to other benefits which are common subjects under labor agreements and are normally

contingent on length of employment, *e.g.*, layoff benefits, pensions, vacation privileges, and the like.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 1965.

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 153—September Term, 1964

(Argued November 12, 1964 Decided January 25, 1965)

Docket No. 29022

PASQUALE J. ACCARDI, JACOB GRUBESICK, ALFRED J. SEEVERS, ANTHONY J. VASSALLO, ABRAHAM S. HOFFMAN, AND FRANK D. PRYOR, PLAINTIFFS-APPELLEES

v.

THE PENNSYLVANIA RAILROAD COMPANY, DEFENDANT-APPELLANT

Before: LUMBARD, Chief Judge, SWAN and WATERMAN, Circuit Judges.

Appeal from judgment of the United States District Court for the Southern District of New York, Metzner, *J.*, 229 F. Supp. 193, granting claims by veterans against their former employer for sums allegedly due them under 50 U.S.C. App. § 308 (1946). Reversed.

WATERMAN, *Circuit Judge:*

Plaintiffs, veterans of World War II, brought suit in the United States District Court for the Southern District of New York. They claimed that defendant,

their former employer, had denied them that portion of a separation allowance, granted in 1960, to which they were entitled under Section 8 of the Selective Training and Service Act of 1940, 50 U.S.C. App. § 308 (1946). Upon cross motions for summary judgment, Judge Metzner awarded the sums claimed by plaintiffs. His opinion is reported at 229 F. Supp. 193.

Defendant has appealed, arguing that the provision of Section 8 relied on by plaintiffs does not apply either to separation allowances or to benefits granted more than one year after an employee's return to work from military service. We reverse the district court on the applicability of Section 8 to separation allowances, and therefore we do not reach defendant's alternative ground for reversal. Nor need we discuss defendant's additional contention on appeal that the district court improperly computed the interest owing on the judgment awarded to plaintiffs.

The relevant facts in this case are stipulated. Plaintiffs first entered the employ of defendant in 1941 and 1942 as firemen on tugboats in New York harbor. They left their jobs during World War II to serve in the armed forces, but at the close of the war they were reinstated in their former positions. Thereafter, they worked continuously as tugboat firemen for defendant until 1960. In December of that year, defendant and the union which represented plaintiffs reached an agreement designed to settle a bitter dispute over reduction of work forces in con-

nection with the transition from steam-powered to diesel-driven tugs. The contract abolished the job of fireman on the diesel tugs but awarded the displaced employees separation allowances that varied in amount according to each employee's "length of compensated service." Plaintiffs were permanently separated from defendant's employ pursuant to the contract, and, in computing their separation allowances, defendant credited them only with time actually spent in its employ for which they received wages.

This suit arises out of plaintiffs' claim that defendant should have included their years in the armed forces in calculating the separation allowances. Plaintiffs do not contend that the phrase "compensated service" was intended by defendant and the union to encompass military service. Rather, they argue that Section 8 of the Act requires that they be credited with their years in the armed forces, regardless of the intent of the parties to the agreement. Plaintiffs are correct in assuming that "no practice of employers or agreements between employers and unions can cut down the service adjustment benefits which Congress has secured the veteran under the Act." *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946). The problem presented by this case is that of whether the statute dictates that military service should have been included in "compensated service," irrespective of the intent of union and employer in choosing that language.

Section 8(b)(B) of the Act requires that a private employer restore a returning veteran "to [his for-

mer] position or to a position of like seniority, status, and pay * * *" Section 8(c) further provides:

> Any person who is restored to a position in accordance with the provisions of paragraph * * * (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

If the separation allowances granted to plaintiffs in 1960 come within the statutory concepts of "seniority, status, and pay," plaintiffs are entitled to be treated as if they had kept their position continuously during World War II. *Fishgold* v. *Sullivan Drydocks & Repair Corp., supra,* at 284–85. On the other hand, if the allowances constituted "insurance or other benefits," plaintiffs are not entitled to be credited with their years in the armed forces, for with certain immaterial exceptions, the agreement between defendant and the union did not treat time spent by employees "on furlough or leave of absence" as "compensated service."

There are no decisions in this circuit or in the Supreme Court determining whether separation allowances are included within the categories of "seniority, status, and pay" or of "insurance or other benefits." However, in *Borges* v. *Art Steel Co.,* 246 F. 2d 735, 738 (2 Cir. 1957), we drew the line between the two categories as follows:

> While the problem of construction is difficult, it seems most likely that the expression "insurance or other benefits" was meant to cover a fairly narrow group of economic advantages whose common quality was that they were miscellaneous fringe benefits not usually regarded as part of "pay," "status," or "seniority."

In *Borges,* we ruled that "wage increases were in no sense fringe benefits, but became a regular part of the jobholder's pay or status, swelling his pay check every week he worked in the future * * *" *Id.* at 738–39. On the other hand, in *Siaskiewicz* v. *General Elec. Co.,* 166 F. 2d 463, 465–66 (2 Cir. 1948), we decided that "since vacation rights are not pay unless they are for work actually done, and since they are not merely a perquisite of seniority, they must fall under the heading of 'other benefits.'" Accord, *Alvado* v. *General Motors Corp.,* 229 F. 2d 408, 410–11 (2. Cir. 1956), *cert. denied,* 351 U.S. 983; *Dwyer* v. *Crosby Co.,* 167 F. 2d 567 (2 Cir. 1948).

With some doubts, we hold that the separation allowances in the present case are properly "other benefits" rather than includable within "seniority, status, and pay." Unlike the wage increases in *Borges,* they did not become a regular part of plaintiffs' earnings, and, like the vacation rights in *Siaskiewicz,* they were neither pay for work actually done nor a traditional perquisite of seniority. On the contrary, they seemingly constituted only a miscellaneous benefit, devised *ad hoc* after intensive collective bargaining in order to serve a transitory purpose. We are confirmed in this conclusion by the decisions of two other Courts of Appeals. *Hire* v. *E. I. du Pont de Nemours & Co.,* 324 F. 2d 546, 549–50 (6 Cir. 1963); *Seattle Star, Inc.* v. *Randolph,* 168 F. 2d 274 (9 Cir.

1948). There are no appellate decisions to the contrary.

Reversed.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fifth day of January one thousand nine hundred and sixty-five.

Present: Hon. J. Edward Lumbard, Chief Judge; Hon. Thomas W. Swan; Hon. Sterry R. Waterman, Circuit Judges.

PASQUALE J. ACCARDI, JACOB GRUBESICK, ALFRED J. SEEVERS, ANTHONY J. VASSALLO, ABRAHAM S. HOFFMAN, FRANK D. PRYOR, PLAINTIFFS-APPELLEES

v.

THE PENNSYLVANIA RAILROAD COMPANY, DEFENDANT-APPELLANT

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed.

A. DANIEL FUSARO, *Clerk.*

U.S. GOVERNMENT PRINTING OFFICE: 1969